

² *Lemery v. Buffalo Airways, Inc.*, 14 Kan. App. 2d 301, 789 P.2d 1176, rev. denied 246 Kan. 767 (1990).

third-party civil action and claimant's attorney in the workers compensation claim. The ALJ also ruled she lacked jurisdiction to determine whether claimant's counsel was entitled to attorney fees for defending himself in a declaratory judgment action,³ and that review and modification⁴ was an inappropriate procedure to determine claimant's counsel's entitlement to fees from the proceeds of the third-party settlement.

In the January 14, 2016, order, the ALJ, pursuant to K.S.A. 44-536(g), denied the motion filed by claimant's attorney requesting post-award attorney fees. The requested fee was based on 74 hours expended by claimant's counsel in defending himself in the declaratory judgment action, at \$175 per hour, totaling \$12,950. The ALJ found she lacked jurisdiction to award attorney fees under these circumstances. She also ruled the services of claimant's counsel for which an attorney fee was sought did not occur subsequent to the ultimate disposition of the initial and original workers compensation claim, and the work for which claimant's counsel sought fees was not directed toward obtaining benefits for claimant, but only to seek attorney fees.

Claimant's counsel contends he is entitled to a 25 percent contingency fee under K.S.A. 44-528, from the amount recovered by respondent from the third-party settlement paying its subrogation lien, and a 25 percent fee from the amount of respondent's credit against future compensation. Claimant's counsel argues K.S.A. 44-504 is unconstitutional and that he is entitled to attorney fees based on *Lemery*. Claimant's attorney maintains the ALJ had the authority to award fees and should have done so.

Claimant's attorney argues the declaratory judgement action was a wrongful use of civil proceedings and a malicious prosecution by respondent against claimant's counsel. Claimant's counsel argues that, without the workers compensation claim, respondent had no basis to file the declaratory judgment action, and that the ALJ erred in finding his expenditure of time was not spent pursuing workers compensation benefits for claimant because the workers compensation claim was the sole basis for the declaratory judgment lawsuit. Claimant's attorney insists respondent named him as a party defendant to prevent him from representing claimant in the declaratory judgment action.

Respondent contends that procedurally claimant's counsel cannot receive fees under K.S.A. 44-528 because that statute does not provide jurisdiction to award fees related to a third-party civil case. Respondent argues attorney fees awarded pursuant to K.S.A. 44-504 and *Lemery*, relate strictly to the attorney representing claimant in the

³ Respondent filed a declaratory judgement action in Sedgwick County District Court, naming claimant's attorney, and others, as defendants. In the declaratory judgment suit respondent alleged there were conflicting claims against the third-party recovery. Claimant was represented by separate counsel in the declaratory judgment suit, the outcome of which is only marginally material to the issues now before the Board.

⁴ See K.S.A 44-528.

third-party claim. Respondent contends claimant's counsel should be barred from requesting attorney fees from the third-party recovery because he agreed to the distribution of those proceeds when the declaratory judgment suit was settled.

Respondent further argues claimant's counsel is not entitled to post-award fees because the 74 hours on which he relies were not expended performing services for claimant, but were incurred solely for attempting to secure attorney fees.⁵ Respondent contends a majority of the work for which claimant's counsel requested hourly fees was not "subsequent to the ultimate disposition of the initial and original claim." as stated in K.S.A. 44-536(g). Respondent requests the Board affirm both of the ALJ's orders.

The issues⁶ are:

1. Is claimant's counsel entitled to a 25 percent contingency fee on sums recovered by respondent for its subrogation lien and credit against future compensation in a review and modification proceeding under K.S.A 44-528?
2. Is claimant's counsel entitled to attorney fees under K.S.A. 44-536(g) for time he spent defending himself in the declaratory judgment action?

FINDINGS OF FACT AND ANALYSIS

The lengthy factual and procedural history of this claim is contained in the previous orders of the Board, the opinions of the Kansas Court of Appeals and the ALJ's orders now on review. It would serve no purpose to repeat that history.

The Board adopts the findings and conclusions set forth in the ALJ's orders, which are incorporated into this Order as though explicitly set forth, are soundly based on the preponderance of the credible evidence and are consistent with the Act.

CONCLUSIONS

1. Claimant's counsel is not entitled to a 25 percent contingency fee on sums recovered by respondent for its subrogation lien and credit against future compensation in a review and modification proceeding under K.S.A 44-528.

⁵ The Board notes the attorney work contemplated by K.S.A. 44-536(g) must be directed toward securing additional benefits for the claimant. See *May v. University of Kansas*, 25 Kan. App. 2d 66, 69-70, 957 P.2d 1117 (1998).

⁶ In his brief to the Board, claimant's counsel argues K.S.A. 44-504 is unconstitutional. The Board will not address that issue because: 1) the Board has no jurisdiction to hold legislation unconstitutional, and 2) the issue was not raised before the ALJ.

2. Claimant's counsel is not entitled to attorney fees under K.S.A. 44-536(g) for time he spent defending himself in the declaratory judgment action.

The Board holds the orders dated December 17, 2015, and January 14, 2016, are hereby affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the Board that the orders of Administrative Law Judge Ali Marchant dated December 17, 2015, and January 14, 2016, are affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of June, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant
walter@griffithlaw.kscoxmail.com

John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
mvpkc@mvplaw.com
jjurcyk@mvplaw.com

Honorable Ali Marchant, Administrative Law Judge